

CITY OF TIGARD, OREGON
TIGARD CITY COUNCIL
ORDINANCE NO. 14-06

AN ORDINANCE AMENDING TIGARD MUNICIPAL CODE CHAPTER 15.06 “FRANCHISED UTILITY ORDINANCE” TO MODIFY A PER FOOT FEE, UPDATE DEFINITIONS, CLARIFY INSURANCE REQUIREMENTS AND UPDATE OTHER SECTIONS.

WHEREAS, Tigard Municipal Code (“TMC”) Chapter 15.06 governs use of the rights-of-way by utility operators; and

WHEREAS, TMC Section 15.06.020 “Definitions” needs to be amended to reflect that the term “gross revenues” means revenue that is ‘derived’ rather than ‘earned’ so as to clarify the basis for the franchise fee calculation; and

WHEREAS, TMC Section 15.06.020 “Definitions” needs to be amended to clarify the term “person” by including any ‘other form of organization’ to reduce confusion in the future about who is qualified as a person; and

WHEREAS, TMC Section 15.06.020 “Definitions” needs to be amended to clarify the term “right-of-way” by broadening it to include rights-of-way owned or maintained by other jurisdictions that are within the city, to the extent the city has authority to authorize use of such rights-of-way; and

WHEREAS, TMC Section 15.06.020 “Definitions” needs to be amended to add the term “telecommunications” which clarifies the use throughout the chapter and to reduce confusion in the future about what qualifies as telecommunications; and

WHEREAS, TMC Section 15.06.020 “Definitions” needs to be amended to clarify the term “telecommunications system” so that it conforms to the new definition of “telecommunications;” and

WHEREAS, TMC Section 15.06.090 “Franchise Fee” requires interest to be paid on late fee payments but is unclear on how the interest is to be calculated. Clarification is necessary to reflect the interest should be “calculated and compounded monthly”; and

WHEREAS, TMC Section 15.06.090 “Franchise Fee” is silent about the need for verification of fee payment accuracy by an officer of the utility provider or other authorized representative with fiduciary responsibility and the reporting form required to be filed with the payment of franchise fees; and

WHEREAS, TMC Section 15.06.100 “Right-of-Way Usage Fee” provides for a per linear foot fee to ensure the City receives fair and reasonable compensation for private use of the rights-of-way. Clarification is needed to address utility companies that do not derive gross revenues in Tigard; and

WHEREAS, TMC Section 15.06.100 “Right-of-Way Usage Fee” requires interest to be paid on late fee payments but is unclear on how the interest is to be calculated. Clarification is necessary to reflect the interest should be “calculated and compounded monthly”; and

WHEREAS, TMC Section 15.06.100 “Right-of-Way Usage Fee” is silent about the need for verification of fee payment accuracy by an officer of the utility provider or other authorized representative with fiduciary responsibility and the reporting form required to be filed with the payment of right-of-way usage fees; and

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WHEREAS, TMC Section 15.06.140 "Renewal" contains a Scribner's error in referencing TMC Section 15.04.120 rather than 15.06.120 and should be corrected. This section does not reference renewal information contained in TMC 15.06.090A and this should be added for clarification; and

WHEREAS, TMC Section 15.06.180 "Insurance" requires update to bring insurance requirements to be in keeping with 2014 insurance practice; and

WHEREAS, TMC Section 15.06.190 "Indemnification" was originally adopted in 2006. Amendment is needed to provide relevant language for today and include claims and hearings before administrative agencies; and

WHEREAS, TMC Section 15.06.220 "Location of Facilities" is silent about high voltage electric lines being exempt from placement underground. Amendment is needed to clarify that point and remove the redundant phrase "within the city," which is included in the definition of "right-of-way"; and

WHEREAS, TMC Section 15.06.240 "As-Built Drawings" requires utility companies provide paper plans of their facilities with the City. Amendment is needed since utility companies now provide plans in an electronic data format; and

WHEREAS, TMC Section 15.06.370 "Application to Existing Agreements" requires clarification on how TMC Chapter 15.06 applies to franchise agreements.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: Sections of TMC Chapter 15.06 are amended as set forth as Exhibit A to this ordinance and are approved and adopted by the City Council.

SECTION 2: This ordinance shall be effective 30 days after its passage by the council, signature by the mayor, and posting by the city recorder.

PASSED: By unanimous vote of all council members present after being read by number and title only, this 8th day of April, 2014.

Carol A. Krager
Carol A. Krager, Deputy City Recorder

APPROVED: By Tigard City Council this 8th day of April, 2014.

John L. Cook
John L. Cook, Mayor

Approved as to form:

[Signature]
Special Counsel

4/8/2014
Date

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EXHIBIT A

~~Strike-through~~ text is deleted from the Code and underlined text is added to the Code.

Tigard Municipal Code

Chapter 15.06 FRANCHISED UTILITY ORDINANCE

Section 15.06.020 Definitions

- **“Gross revenues”** means revenues ~~earned~~derived within the city, less net uncollectibles, from the sale of electrical energy, gas, telecommunications, water, or sanitary sewage disposal and treatment service, and for the use, rental, or lease of utility facilities of the utility engaged in such business.
- **“Person”** means every natural person, firm, co-partnership, association, corporation, ~~or~~entity or other form of organization, but not including special districts or county service districts.
- **“Right-of-way”** includes city streets, roads, bridges, alleys, sidewalks, trails, paths, and all other public ways and areas managed by the city or other public entity within the City of Tigard. “Right-of-way” also includes public utility easements to the extent that the easement allows use by the utility operator planning to use or using the public utility easement. “Right-of-way” includes the subsurface under and airspace over these areas. “Right-of-way” does not include the airwaves for purposes of CMRS, broadcast television, DBS and other wireless providers, or easements or other property interests owned by a single utility or entity. This definition applies only to the extent of the city’s right, title, interest and authority to grant a franchise to occupy and use such areas for utility systems.
- **“Telecommunications”** means any service provided for the purpose of the transmission of audio, video, digital or other forms of electric or electronic signals or information without regard to the transmission protocol employed. Telecommunications includes all forms of telephone services and voice, video, data or information transport, but does not include: (1) cable service as defined in 47 U.S.C. § 522(6); (2) open video system service, as defined in 47 C.F.R. 76; (3) telecommunications provided through a system that is owned or operated exclusively by a person or government entity for their private use and not, directly or indirectly, for sale, resale, lease, trade, barter or other exchange of value; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.
- **“Telecommunications system”** means a system of fibers, lines, cables, antennas, microwave links, or other conduit and supporting structures and equipment constructed or used for the purpose of transmitting or providing telecommunications ~~audio, video, digital or other forms of electric or electronic signals or information~~. “Telecommunications system” does not include a cable ~~communications~~ system as defined in 47 U.S.C. § 522(7). However, if a portion of a cable ~~communications~~ system is also used for telecommunications other than cable ~~communications~~ service, the system is both a cable ~~communications~~ system and a telecommunications system. “Telecommunications system” does not include a system used for the transmission of electric power solely for power purposes, even if a portion of the system is used to communicate information about the power system for use by the system operator. “Telecommunications system” does not include mobile telecommunications equipment (e.g. cellular phones, hand-held or vehicle-mounted radios) but does include fixed antennas and other fixed equipment used to convey signals to or from mobile telecommunications equipment.

Section 15.06.090 Franchise Fee (subsection D and adding subsection E)

- D. The franchise fee shall be payable semi-annually on or before March 15th for the six-month period ended December 31st, and September 15th for the six-month period ended June 30th, unless otherwise stated in the resolution authorizing the franchise. The franchisee shall pay interest at the rate of nine percent per year for any payment made after the due date, calculated and compounded monthly. (Ord. 06-11; Ord. 02-05)

E. Accompanying each payment to the city under this Section, franchisee shall file with the city a written report containing an accurate statement in summarized form of its calculation of the amount of the payment, verified by an officer or other authorized representative of franchisee with fiduciary responsibility, setting forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. The report of a utility operator paying a per linear foot fee shall include the total linear feet of utility facilities in the city and any changes in the total linear feet during the payment period. Such reports shall be in form satisfactory to the city.

Section 15.06.100 Right-of-Way Usage Fee (subsections A & E and adding subsection F)

- A. All persons using a utility system or facility in the right-of-way to provide service to customers within the City of Tigard shall pay a right-of-way usage fee that is the greater of: (1) the applicable percentage of gross revenues set forth in subsection B of this section or (2) \$10,000.00. Any person that owns a utility system or facility in the right-of-way of the City of Tigard but does not derive any gross revenues from such system or facility shall pay a right-of-way usage fee that is the greater of; ~~or (2)~~ (1) the linear foot fee set by council resolution pursuant to subsection C of this section or (2) \$10,000.00. The right-of-way usage fee is subject to any applicable limitations imposed by federal and state statutes, including the privilege tax limitations set forth in ORS 221.410 through 221.655; Payment shall be made on the schedule set forth in subsection E of this section or as specified in a franchise agreement.
- E. Unless otherwise agreed to by the city, the right-of-way usage fee shall be payable semi-annually on or before March 15th for the six-month period ended December 31st, and September 15th for the six-month period ended June 30th. The utility shall pay interest at the rate of nine percent per year for any payment made after the due date, calculated and compounded monthly. (Ord. 12-04 §§1, 2; Ord. 08-21A; Ord. 06-11)
- F. Accompanying each payment to the city under this Section, utility operator shall file with the city a written report containing an accurate statement in summarized form of its calculation of the amount of the payment, verified by an officer or other authorized representative of utility operator with fiduciary responsibility. The report of a utility operator paying based on a percentage of revenue shall set forth its Gross Revenues according to their accounting subdivisions, and any deductions claimed for the period upon which the payment is computed. The report of a utility operator paying the per linear foot fee shall include the total linear feet of utility facilities in the city and any changes in the total linear feet during the payment period, and a statement that the utility operator does not derive any gross revenues from its utility system or facilities in the city. All reports shall be in a form satisfactory to the city.

Section 15.06.140 Renewal

- A franchisee that desires to renew a franchise shall submit a letter requesting renewal including the information set forth in Sections 15.06.090A and 15.0406.120 to the city manager no less than 180 days before expiration of the franchise. (Ord. 06-11)

Section 15.06.180 Insurance

- A. All utility operators shall maintain in full force and effect commercial general liability insurance covering bodily injury and property damage on an “occurrence” form (~~1996 ISO CG 2010 1185~~ or equivalent) and automobile liability insurance to cover vehicles used in connection with utility operators activities acceptable to the city. Such insurance shall cover ~~all~~ risks arising directly or indirectly out of the utility operator’s activities or work under this chapter, including all subcontractors to any tier. The policy or policies of insurance maintained by the utility operator shall provide at least a general aggregate limit of \$5 million with a per occurrence limit of \$3 million, insuring the utility operator and naming the city, its officers, directors and employees as ~~an~~ additional insureds with respect to this chapter on the policy. The utility operator shall cause a certificate of insurance to be provided to the city recorder.

Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits reflected above shall be included.

If utility operator’s liability insurance is on a “claims-made” basis and (1) coverage is in any way cancelled, non-renewed or coverage otherwise terminates or (2) the franchise agreement is not renewed, utility operator will provide two years of continuous claims-made coverage or provide tail coverage for a period of two years.

- B. Workers’ Compensation coverage as required by Oregon law and Employer’s Liability Insurance with limits equal to \$1 million shall be maintained in full force and effect in a form acceptable to the city.

- ~~B.C.~~ As an alternative, a utility operator may provide and keep in force self-insurance or a self-insured retention plus insurance in an equal amount to the insurance required to be obtained from a third-party insurer. The utility operator shall provide proof of self-insurance acceptable to the city if it chooses to self-insure.

- ~~C.D.~~ The procuring of required insurance or self-insurance shall not be construed to limit utility operator’s liability. Notwithstanding said insurance or self-insurance, the utility operator shall be obligated for the total amount of any damage, injury, or loss caused by the utility’s operations negligence or neglect connected with this chapter.

- ~~D.E.~~ There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without ~~30 days~~ written notice to the city. Any failure to comply with this provision will not affect the insurance coverage provided to the city. ~~A 30 days’ notice of cancellation provision shall be physically endorsed on the policy.~~

- ~~E.F.~~ The utility operator’s coverage shall be primary to the extent permitted by law and insurance maintained by the city is excess and not contributory insurance as to the insurance required by this chapter. (Ord. 06-11)

Section 15.06.190 Indemnification

Each utility operator shall defend, indemnify and hold the city and its officers, employees, agents and representatives harmless from and against any and all liability, causes of action, claims, damages, losses, judgments and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place including any hearing before federal or state administrative agencies) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, or removal of its facilities, and in providing or offering services over the facilities, whether such acts or omissions are authorized, allowed, or prohibited by this chapter or by a franchise agreement except that arising out of the sole negligence of the City. The utility operator shall use legal counsel acceptable to the City, which may be separate legal counsel if reasonably requested by the City in the event the utility operator's legal counsel cannot adequately represent the City. Upon notification of any such claim the city shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim. (Ord. 06-11)

Section 15.06.220 Location of Facilities

- All facilities located within the right-of-way shall be constructed, installed and located in accordance with the following terms and conditions, unless otherwise specified in a franchise agreement.
 - A. Whenever all existing electric utilities (not including high voltage electric lines), cable facilities or telecommunications facilities are located underground within a right-of-way ~~of the city~~, the city may require a utility operator with permission to occupy the same right-of-way to locate its facilities underground.
 - B. Whenever all new or existing electric utilities (not including high voltage electric lines), cable facilities and telecommunications facilities are located or relocated underground within a right-of-way ~~of the city~~, the city may require a utility operator that currently occupies the same right-of-way to relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the right-of-way. (Ord. 06-11)

Section 15.06.240 As-Built Drawings

- The utility operator shall provide the city with ~~two complete sets of electronic data in read-only format showing current~~ engineered plans in a form acceptable to the city showing the location of all its utility facilities within rights-of-way after initial construction of its system and, to the extent available, shall provide the city two updated complete sets of as-built plans annually, upon request by the city. (Ord. 06-11)

Section 15.06.370 Application to Existing Agreements

- This chapter shall be applied to all persons and activities, including ~~existing~~ franchisees, to the extent that this chapter is not in conflict with and can be implemented consistent with the terms of the franchise, except that it shall not affect contract rights of existing franchisees. This chapter shall fully apply to existing franchisees on termination of existing franchises. (Ord. 06.11; Ord. 00-35)